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Real Property Survey

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Abstract

This article is a survey of the decisions of the Florida Supreme Court made between October 1, 1988, and September 30, 1989, which directly concern the law of real property.

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I. Introduction

This article is a survey of the decisions of the Florida Supreme Court made between October 1, 1988, and September 30, 1989, which directly concern the law of real property. They involve both issues of private and public law, varying from disputes between buyers and sellers to the scope of judicial review in a zoning case.

II. Attorney's Fees Under A Contract of Sale

A. *Gibson v. Courtois*¹

A prospective buyer made an offer to purchase a home, but prior to its acceptance, he revoked the offer and demanded the return of the deposit which had been placed in escrow. When the escrow agent filed an interpleader action to determine who should get the deposit, the buyer prevailed and moved for the court to award him attorneys' fees pursuant to a provision of the contract.² The trial court refused, reasoning that there had never been a contract because the offer had been revoked, and the Second District Court of Appeal affirmed.³ The Florida Supreme Court affirmed, holding that a party "is not obligated under a contract provision to which he never assented."⁴

The purchaser argued that the seller should be estopped from denying the effectiveness of the attorney's fees provision because he had asserted that the entire contract was valid. The court found the princi-

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1. 539 So. 2d 459 (Fla. 1989). Justice Kogan wrote the opinion in which Justices Ehrlich, McDonald, Shaw and Grimes concurred. Justice Barkett wrote a dissenting opinion in which Justice Overton concurred.

2. The standard Florida Bar residential real estate contract provided: "Attorney's Fees and Costs: In connection with any litigation arising out of this contract, the prevailing parties shall be entitled to recover all costs incurred, including reasonable attorney's fees." *Gibson v. Courtois*, 509 So. 2d 962 (Fla. 2d Dist. Ct. App. 1987).

3. *Id.*

4. *Id.* at 461.

ple of estoppel to be "simply inapplicable in this situation."⁵ It reasoned that the argument could just as easily be applied against the buyer who had recovered his deposit because he had successfully argued that no contract ever came into existence, *i.e.*, that he should be estopped from claiming the validity of the contract provision in the contract he had argued was invalid.⁶

The Florida Supreme Court also held that the attorney's fees provision was not severable from the other provisions of the sales contract. The seller had argued that the trial court had enforced the escrow provisions of the contract and thus should also enforce the attorney's fees provision. The court rejected this argument, reasoning that the escrow provisions of the contract had not been enforced and were, in fact, unenforceable. What the trial court had done was to order the return of the deposit to avoid unjust enrichment.⁷

Justice Barkett's dissent merely expresses agreement with an earlier dissent written by Judge Schwartz in *Leitman v. Boone*.⁸ The point is less than clear. The essence appears to be that the sellers, by relying upon the contract in resisting the return of the deposit to the buyers had subjected themselves to the attorney's fees provision of the contract. Unfortunately, the dissent never makes it clear why that should be so.⁹

B. *Katz v. Van Der Noord*¹⁰

In this case, the purchaser of a mobile home park had refused to close after discovering that expenses would exceed the level that had been warranted in the contract. The trial court had ordered the return of the deposit and granted a new trial on damages.¹¹ After remand from the district court, in which the new trial order was overturned, the buyer moved for, and was awarded, attorney's fees based upon a provi-

5. *Id.* at 460.

6. *Id.* at 460-61.

7. *Id.* at 461.

8. 439 So. 2d 318, 323-25 (Fla. 3d Dist. Ct. App. 1983).

9. *Gibson*, 539 So. 2d at 461 (Barkett, J., dissenting).

10. 546 So. 2d 1047 (Fla. 1989). Chief Justice Ehrlich and Justices Overton, McDonald, Shaw, Grimes, and Kogan concurred in the *per curiam* opinion. Justice Barkett concurred only in the result without writing an opinion.

11. *Id.* at 1048 (trial court entered judgment notwithstanding jury verdict for buyer).

sion in the contract.¹²

The Fifth District Court of Appeal held that the buyer could not recover attorney's fees because he had elected to rescind the contract. Rescission, it reasoned, extinguished the contract, so no relief could be granted under one of its provisions.¹³ The supreme court rejected this logic, stating,

We hold that when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable. The legal fictions which accompany a judgment of rescission do not change the fact that a contract did exist. It would be unjust to preclude the prevailing party to the dispute over the contract which led to its rescission from recovering the very attorney's fees which were contemplated by that contract.¹⁴

The court explained that this decision was consistent with *Gibson v. Courtois*,¹⁵ discussed above, which it distinguished because in that case no contract had ever existed. In this case the contract had existed, but it had been rescinded. The case was also remanded to determine if the award of attorney's fees was barred by *res judicata* as used in an earlier district court opinion denying damages including certain attorney's fees.¹⁶

It seems that the decision really turns on the nature of rescission, and it is regrettable that the court did not elaborate on this point. This case could have been used to distinguish between the judicial remedy of rescission and the right of a party to a contract to cancel, or refuse to perform, where the other party had committed a material breach. In the former situation, by court order, the parties are returned to their position *status quo ante*, while in the latter the nonbreaching party is simply relieved of any further obligation to perform, leaving the contract provisions, such as the attorney's fees provision, in effect.

12. *Id.*

13. *Id.*

14. *Id.* at 1049.

15. *Gibson*, 539 So. 2d at 459.

16. *Katz*, 546 So. 2d at 1050.

III. Bonds Issues

In *Partridge v. St. Lucie County*,¹⁷ the county sought the validation of special assessment bonds which were to be used to finance street and drainage improvements within a municipal service benefit unit (MSBU). The circuit court validated the bond issue after concluding that the county had complied with all the requirements of the law.¹⁸

The appellants owned property within the MSBU. They sought to intervene for the purposes of appealing the circuit court's decision. Their point was that the improvements were not needed and that they, and other property owners, could not afford the special assessments. The supreme court concluded, however, that those were political questions to be decided by the County Commission. Precedent had established that the court's role in the bond validation process is limited solely to determining if the issuing body has the power to act and if that body has exercised its power in accordance with the law.¹⁹

IV. Contractor's Bonds

In *American Casualty Co. v. Coastal Caisson Drill*,²⁰ the Second District Court of Appeal certified the following question to the supreme court: "May a subcontractor furnishing labor, services or equipment worth over \$200,000 on a public works project lawfully waive its rights to the contractor's bond required pursuant to sections 255.05 and 337.18, Florida Statutes (1985)?"²¹ The supreme court decided that the answer is no.²²

The contract contained an express waiver provision on the back, even though on the front it provided that performance would be "in accordance with all applicable DOT specifications, which included the

17. 539 So. 2d 472 (Fla. 1989). Chief Justice Ehrlich and Justices Overton, McDonald, Shaw, Barkett, Grimes, and Kogan concurred in the unanimous *per curiam* decision.

18. FLA. STAT. ch. 75 and ch. 125, pt. I (1987).

19. *Partridge*, 539 So. 2d at 473 (relying upon *DeSha v. City of Waldo*, 444 So. 2d 16, 18 (Fla. 1984), which quoted *Town of Medley v. State*, 162 So. 2d 257, 259 (Fla. 1964)).

20. 542 So. 2d 957 (Fla. 1989). Justice McDonald wrote the unanimous opinion. Chief Justice Ehrlich and Justices Overton, Shaw, Barkett, Grimes, and Kogan concurred in the opinion.

21. *Id.*

22. *Id.*

bond requirement.”²³ When an unpaid subcontractor filed suit against the contractor’s surety, the trial court found this apparent conflict in contract terms created an ambiguity in the contract, but the supreme court found no such ambiguity.²⁴ It reiterated that it is the intention of the parties which is controlling and that intent is to be deduced from the language employed. The two terms were not necessarily inconsistent because there was nothing in the term on the front which prevented either party from waiving its rights to the bond, as was expressed by the provision on the back.²⁵

The court stated that the statute has two purposes. The first is to provide protection to subcontractors on public works because subcontractors are deprived of their ordinary method of protection on private construction, i.e., by obtaining a mechanic’s lien.²⁶ The second is to protect the public from (a) the price increases, or at least variations, which would result from subcontractors having to bear the risk of non-payment, and (b) from the risk of delay caused by unpaid subcontractors’ litigation. The public could lose this protection if the subcontractor was allowed to waive its rights against the bond in advance. Consequently, the court concluded, there exists a legislative policy against allowing waiver in advance by the subcontractor.²⁷

This policy against waiver was also evident in the statute itself. The statute provided certain exemptions from the bond requirement,²⁸ but also provided for unrestricted waiver. This was taken as evidence that the legislature had not intended to allow waiver.²⁹

In addition, the surety asked the court to consider the similarity between the mechanics’ lien statute and the payment bond statute because under the mechanics’ lien statute a subcontractor is free to waive its rights.³⁰ The court accepted this invitation but decided that it would lead to the opposite conclusion. The legislature had recently amended

23. *Id.*

24. *Id.* at 958.

25. *American Casualty*, 542 So. 2d at 958.

26. *Id.*

27. *Id.* at 958-59.

28. FLA. STAT. § 255.05(1)(a) (1987).

29. This is an example of the canon of statutory interpretation, “*expressio unius est exclusio alterius*” (the expression of one excludes others). By expressing certain exceptions from the bond, the legislature must not have intended any others, such as waiver by the subcontractor.

30. *American Casualty*, 542 So. 2d at 958. FLA. STAT. § 713.20(2) (1987), provided that anyone but a laborer could waive a mechanics’ lien at any time.

the mechanics' lien statute to provide that a mechanics' lien could not be waived in advance either.³¹ This subsequent action, the court concluded, demonstrated a "legislative policy against waiver."³²

V. Eminent Domain

A. *Palm Beach County v. Tessler*³³

The question certified by the Fourth District Court of Appeal was: "Are the owners of commercial property located on a major public roadway entitled to a judgment of inverse condemnation when the county government blocks off any access to the property from the roadway and leaves access thereto only through a circuitous alternative route through residential streets?"³⁴

The court first held that "there can be no doubt that where access is entirely cut off, a taking has occurred,"³⁵ because abutting owners have easements of access, light and air from the street or highway which is appurtenant to their land.³⁶ However, in this case access was not entirely cut off. The county, as part of road widening and bridge construction had built a retaining wall directly in front of the plaintiff's beauty salon, but the salon could be reached by "an indirect winding route of some 600 yards through a primarily residential neighborhood."³⁷

The court distinguished *Division of Administration v. Capital Plaza, Inc.*,³⁸ in which the impairment of traffic flow by installation of a median in the road prevented northbound drivers from turning directly into the landowner's filling station. The court in that case held that no taking had occurred. The court in *Tessler* pointed out that *Capital Plaza* did not involve a deprivation of access, but only an impairment of traffic flow, whereas *Tessler* involved a deprivation of

31. Fla. Laws Ch. 88-397.

32. *American Casualty*, 542 So. 2d at 958.

33. 538 So. 2d 846 (Fla. 1989). Justice Grimes wrote the unanimous opinion. Chief Justice Ehrlich and Justices Overton, McDonald, Shaw, Barkett, and Kogan concurred in the opinion.

34. *Id.* at 847.

35. *Id.* at 848.

36. *Id.* (relying upon *Benerofe v. State Road Dept.*, 217 So. 2d 838 (Fla. 1969) and *Department of Transp. v. Jirik*, 498 So. 2d 1253 (Fla. 1986)).

37. *Id.* at 847.

38. 397 So. 2d 682 (Fla. 1981).

access.³⁹

The court also discussed, approvingly, *Pinellas County v. Austin*,⁴⁰ wherein the district court of appeal concluded that a landowner could recover for the impairment of access caused when the county vacated a road leading to the property. The landowner was allowed to recover because he had suffered special damages, i.e., damages not common to the general public. His damages could, however, be reduced by the availability of another means of access, here an old wooden bridge which could not support service vehicles such as garbage and fire trucks.⁴¹

The court, in a footnote, acknowledged considering cases involving a partial taking of land as well as the destruction of access, but considered that appropriate because both are compensable.⁴² It then drew the conclusion that "[t]here is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself."⁴³ To recover, the access must be "substantially diminished."⁴⁴ The damages recoverable are for the reduction in the value of the property caused by the loss of access and the "extent of access which remains after a taking is properly considered in determining the amount of compensation."⁴⁵ Furthermore, business damages are available under the Florida statute.⁴⁶

The court noted, while approving the decision of the district court, that it had erred in holding that whether walling off the landowner's property amounted to a substantial diminution rather than a mere inconvenience was a question of fact. In inverse condemnation proceedings, the judge is the fact finder and must resolve all conflicts in the evidence. Then the judge must decide, as a matter of law, whether the governmental activity has caused the landowner to suffer a substantial

39. *Tessler*, 538 So. 2d at 849.

40. 323 So. 2d 6 (Fla. 2d Dist. Ct. App. 1975).

41. *Id.* In support of this proposition, the court cites to "City of Port St. Lucie v. Parks, 452 So. 2d 1089, 1090-91 (Fla. 4th Dist. Ct. App.) ("Diminishment in quality of access . . . means an actual impairment which results in some deprivation to the property, but does not include mere inconvenience."), *rev. denied*, 459 So. 2d 1041 (Fla. 1984). *Tessler*, 538 So. 2d at 849.

42. *Tessler*, 538 So. 2d at 849.

43. *Id.*

44. *Id.*

45. *Id.*

46. FLA. STAT. § 73.071 (1987).

loss of access.

It is unfortunate that the court does not clarify whether it is discussing the provision in the Florida Constitution⁴⁷ or the Taking Clause in the United States Constitution.⁴⁸ While it may seem obvious to the court and to most readers that the court is referring to the Florida Constitution, that reference is not explicitly expressed anywhere in the decision. The total lack of citation to any non-Florida case may help to emphasize that it is the Florida Constitution being discussed.

B. *Texaco v. Department of Transportation*⁴⁹

The Second District Court of Appeal certified the following question as being of great public importance:

Is a lessee of property partially taken by eminent domain entitled to business damages pursuant to section 73.071(3)(b), Florida Statutes (1985), when the lessee is a wholesale supplier of products to a sublessee who operates a retail business on the premises and the lessee assists its sublessee in that retail business by, for example, having constructed the building and other physical improvements used by the retail business, allowing the business to be operated under the lessee's nationally recognized company name with the lessee's sign and to use the lessee's credit card services, conducting site inspections at the business to ensure compliance with the lessee's standards, and paying the real estate taxes on the property?⁵⁰

The court answered the question in the negative.⁵¹

Texaco leased the property, constructed a service station and subleased it to the station operator who operated a "Texaco" station in accord with the requirements of the sublease. When the Department of Transportation condemned a portion of the property, both the station operator and Texaco claimed business damages under the statute. The

47. FLA. CONST. art. X, § 6.

48. U.S. CONST. amend. V, as incorporated into the Due Process Clause of U.S. CONST. amend. XIV. See *Chicago B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

49. 537 So. 2d 92 (Fla. 1989). Justice Overton wrote the unanimous opinion. Chief Justice Ehrlich and Justices McDonald, Shaw, Barkett, Grimes, and Kogan concurred in his opinion.

50. *Id.*

51. *Id.* at 94-95.

trial court held that Texaco had retained a sufficient interest in the property to be entitled to the business damages, but the district court of appeal reversed.⁵²

Texaco asserted that business damages were constitutionally required by the court's decision in *Meyers v. City of Daytona Beach*,⁵³ but the court decided that *Meyers* was not controlling because business damages had not been addressed in that case. The court in *Meyers* held only that, in a condemnation proceeding, a jury could not award a property owner less than the lowest amount fixed by the evidence because that would not provide the "full compensation" required by the Florida Constitution.⁵⁴ The *Texaco* court held that business damages are not required by either the Florida or United States Constitutions. They are incidental and consequential damages which are allowed "as a matter of legislative grace."⁵⁵

The court concluded that Texaco was not entitled to business damages under the statute because it did not meet one of the statutory requirements.⁵⁶ The statute requires, *inter alia*, that a business physically exist on the property. The court found, under the facts, that Texaco did not operate a business on the property. It did derive an income from the sale of gasoline, there but it was merely a distributor-wholesaler who sold to the operator who was in the business of selling to the public at that location. The fact that Texaco did not have a license to do business there supported that conclusion, as did the fact that, under the lease, any business losses at that location would be suffered by the operator.⁵⁷

Texaco claimed that the District Court's interpretation of the statute would violate equal protection. That was disposed of summarily by the supreme court which held, without analysis or citation to authority, that the statute did not create "an unreasonable unconstitutional classification,"⁵⁸ because to decide otherwise might open the door to a multitude of claims by those situated similarly to Texaco.⁵⁹

52. The award of business damages to the operator was not addressed by the District Court of Appeal. *Id.* at 93 n.1.

53. 158 Fla. 859, 30 So. 2d 354 (1947).

54. *Texaco*, 537 So. 2d at 94.

55. *Id.* at 93.

56. *Id.* (citing FLA. STAT. § 73.071(3)(b) (1985)).

57. *Id.*

58. *Id.* at 94.

59. *Texaco*, 1537 So. 2d at 93-94.

C. *Conway Land, Inc. v. Terry*⁶⁰

This case also deals with eminent domain issues, and is discussed *infra* in section XI (Rule Against Perpetuities).

VI. Homestead

In *In re Estate of Scholtz*,⁶¹ the Fourth District Court of Appeal certified the following question to be of great public importance: "Is the concept of abandonment as set out in *Barlow v. Barlow* still viable in view of the 1985 amendment of the homestead provisions of the Florida Constitution?"⁶² The supreme court concluded that the answer is no.⁶³

Prior to 1985, the Florida Constitution provided that certain property owned by the head of a family would be homestead and would therefore be exempt from attachment by creditors and would be subject to limits on the owner's ability to devise it if he was survived by a spouse or a minor child.⁶⁴ In *Barlow v. Barlow*,⁶⁵ the court held that a spouse who had abandoned the homestead would not be able to make a claim against it under the latter provision after the other spouse died. However, in 1985 the term "head of a family" was eliminated and replaced by the term "a natural person," leaving the question "whether the concept of abandonment has survived the elimination of the head of the family language"⁶⁶ In this case, the husband had purchased the home after separating from his wife, titled it solely in his name and, shortly before his death, moved to a nursing home. But the district court decided that the husband's property was homestead.⁶⁷

This is not the typical abandonment case. Generally, it is the abandoning spouse who is denied a homestead claim on the home he or she has abandoned. Here, the abandoning spouse obtained a new home,

60. 542 So. 2d 362 (Fla. 1989).

61. 543 So. 2d 219 (Fla. 1989). Justice Grimes wrote the opinion in which Justices Shaw, Barkett, and Kogan concurred. Justice McDonald specially concurred in a written opinion. Chief Justice Ehrlich filed a written dissent in which Justice Overton concurred.

62. *Id.*

63. *Id.*

64. FLA. CONST. art. X, § 4.

65. 156 Fla. 458, 23 So. 2d 723 (1945).

66. *Scholtz*, 543 So. 2d at 220.

67. *Id.* at 219.

and the court was determining if that home was homestead to which the abandoned spouse has a valid claim.

The supreme court had already decided that the 1985 amendment allowed homestead property to pass to adult heirs free from the claims of creditors, even if the heirs were not dependent on the decedent.⁶⁸ The court in that case had relied upon the plain language of the provision, the legislative history of the amendment, and the fact that homestead property had descended free of creditors' claims even before the amendment. The crux of the decision was that, after the amendment, more property would be considered homestead and, therefore, entitled to this protection.⁶⁹

Unlike the earlier case, the supreme court found no legislative history helpful in solving the question presented by this case. However, it recognized that the concept of abandonment could be predicated upon two bases. First, a spouse who abandons and sets up his own residence elsewhere, having no intent of returning, could not be the head of a household living in the abandoned premises. Consequently, the abandoning spouse could not be the head of the household residing there.⁷⁰ Second, it would be inequitable for the spouse who has abandoned to later claim the property as homestead when the other spouse dies. Both of these are "related to the definition of homestead which contemplated a 'head of the family.'"⁷¹ Since the head of the family concept had been deleted from the homestead provision of the constitution, so should the concept of abandonment of homestead.

Moreover, the language of the amendment is "clear and unambiguous."⁷² The property is homestead if the decedent is survived by a spouse or minor child. The decedent in this case died leaving a spouse, so the property is homestead, and its descent is limited by the Florida Constitution and determined by Florida statute.⁷³

Justice McDonald's special concurrence is based upon his expressed preference that one must be the head of a household to preclude a devise of real property because the policy behind that preferred

68. *Public Health Trust v. Lopez*, 531 So. 2d 946 (Fla. 1988). "The Court pointed out that the cases relied upon by the creditors were ones in which it had been decided that the owner was not the head of the family at the time of his death." *Scholtz*, 543 So. 2d at 220.

69. *Id.*

70. *Id.* at 221.

71. *Id.*

72. *Id.*

73. *Scholtz*, 543 So. 2d at 221 (citing FLA. STAT. § 732.401(1) (1987)).

requirement is different than the one behind the exemption from forced sale and taxation. Consequently, he would have preferred the result asserted by Chief Justice Ehrlich's dissent, but agreed that the majority's opinion is correct.⁷⁴

Chief Justice Ehrlich asserts that the 1985 amendment eliminated the "head of the household" language only for the first three sections and retained it in section 4, which controls the limitation on ability to devise the property. The purpose of section 4 was the protection of the family in the event of the death of the head of the household. The purpose of the 1985 amendment was to broaden the protection provided by homestead under all four sections by expanding the possibilities that property would be considered homestead. The majority's reading narrows the family's protection under section 4.⁷⁵

Moreover, under the majority's reading, the spouse who has abandoned would have the advantage of being able to claim homestead on his or her own property and also benefit from the homestead status of property owned by the abandoned spouse. Certainly, the Chief Justice reasoned, it was not the purpose of the amendment to benefit an abandoning spouse by giving him or her two homesteads, because this would encourage abandonment, clearly the antithesis of protecting the family, which is the purpose behind homestead.⁷⁶

VII. Implied Warranty of Habitability

In *Almand Construction v. Evans*,⁷⁷ the plaintiffs bought a new home in 1972. It began to settle some time before 1978 and in that year they notified the builder who attempted to repair the structural damage in 1979. They did not learn the reason for the settling, that the house was built on unsuitable fill, until 1982 when they received a report from an engineer retained by their insurance company. This suit, based upon the theories of negligence and breach of implied warranty, was commenced in 1985. Consequently, the circuit court granted summary judgment for the defendant on the theory that the action was barred by the statute of limitations.⁷⁸

74. *Id.* at 221-22 (McDonald, J., dissenting).

75. *Id.* at 222 (Ehrlich, J., dissenting).

76. *Id.*

77. 547 So. 2d 626 (Fla. 1989). Chief Justice Ehrlich wrote the unanimous opinion. Justices Overton, McDonald, Shaw, Barkett, Grimes, and Kogan concurred in the opinion.

78. *Id.* FLA. STAT. § 95.11(3)(c) (1977) provides a four year statute of limita-

The plaintiffs claimed that since they did not discover the cause of the settling until 1982, the statute of limitations should not have begun to run until 1982. However, in opposition to the motion for summary judgment, the plaintiffs "offered no evidence [to demonstrate] circumstances which would toll the statute [of limitations,] and nothing in the record supported that conclusion."⁷⁹

Furthermore, the court specifically stated, the "mere assertion that the [plaintiffs] were not aware that unsuitable and defective fill was the cause of the structural problems until 1982 was insufficient to create an issue as to whether the statute of limitations was tolled."⁸⁰ The plaintiffs could not rely upon their lack of knowledge of the specific cause of the damage to prevent their action from being barred by the statute of limitations. As early as 1978, they knew that the house was settling and that the settling was causing structural damage and this was "sufficient to put them on notice that they had, or might have had, a cause of action."⁸¹ Consequently, the four year statute of limitations had run long before they brought this action in 1985.

The court went on to state that the decision was consistent with its decision in *Kelley v. School Board of Seminole County*⁸² which rejected the continuous treatment doctrine. Like *Almand Construction*, *Kelley* involved a construction defect, although in that case the law suit was against the architect. The defendant invoked the statute of limitations even though he had been involved in attempts to correct the problems.⁸³ The district court had held that the statute of limitations was tolled under the continuous treatment doctrine during that period when the defendant continued to try to remedy the problem.⁸⁴ In quashing the district court opinion, Justice McDonald pointed out that, regardless of the lack of knowledge of the specific defect, the plaintiffs' knowledge that something was wrong made the statute begin to run. He quoted approvingly that "people should exercise their rights within

tions for actions based, inter alia, upon "construction of an improvement to real property, with the time running from the date of actual possession by the owner . . . except that when the action involves a latent defect, the time runs from the time the defect is discovered or should have been discovered."

79. *Almand Constr.*, 547 So. 2d at 628.

80. *Id.*

81. *Id.*

82. 435 So. 2d 804 (Fla. 1983).

83. *Id.* at 805.

84. *School Bd. of Seminole County v. GAF Corp.*, 413 So. 2d 1208 (Fla. 5th Dist. Ct. App. 1982).

the limitations set and that this period should not be extended by good faith attempts to remedy a defect.'"⁸⁵ It is also interesting to note that Justice Overton, who in his dissent in *Kelley* advocated accepting the continuous treatment doctrine,⁸⁶ did not dissent in *Almand Construction*.

VIII. Mechanics' Liens

A. *Home Electric of Dade County, Inc. v. Gonas*⁸⁷

This case involved the interpretation of Florida Statutes section 713.16(2) (1985), which provides:

At the time any payment is to be made by the owner . . . directly to a lienor, the owner may in writing demand of any lienor a written statement under oath of his account. . . . Failure or refusal to furnish the statement within 30 days after demand or a false, or fraudulent statement, shall deprive the person . . . of his lien.

A subcontractor had filed a claim of mechanics' lien and the homeowner had made a demand for the written accounting under oath as provided for in the above statute. The subcontractor failed to comply by neglecting to providing the statement. So when the subcontractor brought an action to foreclose the lien, the homeowner moved for summary judgment.⁸⁸

The homeowner's demand had not, however, included any mention that the statute would eliminate the lien if the accounting was not made within thirty days. The First District Court of Appeal, in interpreting an earlier version of the statute, had held that the demand letter must include such a notice.⁸⁹ Relying upon this precedent, the trial court denied the homeowner's motion for summary judgment. The Third District, however, reversed,⁹⁰ creating a conflict among the

85. *Kelley*, 435 So. 2d at 806 (quoting *K/F Dev. & Inv. Corp. v. Williamson Crane & Dozer Corp.*, 367 So. 2d 1078 (Fla. 3d Dist. Ct. App.), cert. denied, 378 So. 2d 350 (Fla. 1979)).

86. *Id.* at 807 (Overton, J., dissenting).

87. 547 So. 2d 109 (Fla. 1989). Justice McDonald wrote the unanimous opinion. Chief Justice Ehrlich and Justices Overton, Shaw, Barkett, Grimes, and Kogan concurred in the opinion.

88. *Id.* at 110.

89. *Alex v. Randy, Inc.*, 305 So. 2d 13 (Fla. 1st Dist. Ct. App. 1974).

90. *Gonas v. Home Elec., Inc.*, 537 So. 2d 590 (Fla. 3d Dist. Ct. App. 1988).

districts.

The supreme court pointed out that a mechanics' lien is a "statutory creature"⁹¹ and, consequently, must be "strictly construed in every particular."⁹² This rule of construction had been ignored by the First District when, by its liberal construction of the statute, it had added its own notice requirement.⁹³ The supreme court held that the statute does not expressly require that the demand include a notice of the time limit and so no such notice is required for the demand to be proper.⁹⁴

B. *The Florida Bar: In re Advisory Opinion-Nonlawyer Preparation of Notice to Owner and Notice to Contractor*⁹⁵

The first step in perfecting a mechanics' lien, when a payment bond has not been provided, is for the lienor to serve a Notice to Owner.⁹⁶ When a payment bond has been furnished, the first step of a lienor not in privity with the owner is to furnish a Notice to Contractor.⁹⁷ The current practice is for prospective lienors to have such notices served by businesses, not lawyers, who do it as a profit-making business. This led the Florida Bar Standing Committee on the Unlicensed Practice of Law to consider the question: "Is it the unlicensed practice of law for a nonlawyer to prepare the Notice To Owner required by Fla.Stat. § 713.06(2) and the Notice to Contractor required by Fla.Stat. § 713.23(1)(d)?"⁹⁸

The committee conducted public hearings, and six representative companies testified that they prepare from a few hundred to a few thousand notices per month at an average cost of twenty-five dollars each. Generally, the business takes the information—*i.e.*, the lienor's name, address, the services or materials being provided, the name of

91. *Gonas*, 547 So. 2d at 110.

92. *Id.* at 111 (quoting with approval *Palmer Elec. Servs., Inc. v. Filler*, 482 So. 2d 509, 510 (Fla. 2d Dist. Ct. App. 1986)).

93. *Alex*, 305 So. 2d at 14-15. Consequently, the court disapproved of *Alex* "to the extent of conflict with this decision." *Gonas*, 547 So. 2d at 110-11.

94. *Gonas*, 547 So. 2d at 111.

95. 544 So. 2d 1013 (Fla. 1989). This was an unanimous *per curiam* opinion. Chief Justice Ehrlich and Justices Overton, McDonald, Shaw, Barkett, Grimes, and Kogan concurred in the opinion.

96. FLA. STAT. § 713.06(2) (1987).

97. FLA. STAT. § 713.23(1)(d) (1987).

98. *Advisory Opinion*, 544 So. 2d at 1013.

the property owner and the location of the property—over the telephone or from a filled out information sheet. The business then verifies the information from the public records and sends the completed notice by certified mail to the property owner and any other appropriate recipient. If a lienor who wants to proceed to perfect or foreclose a mechanics' lien, *i.e.*, the lienor needs a Claim of Lien or a Notice of Nonpayment, the lienor is told to consult an attorney.⁹⁹

The Bar committee concluded that this was unlicensed practice of law, but that it was activity which was authorized so long as the businesses used statutory or court-approved forms.¹⁰⁰ Therefore, "non-lawyers may complete and serve the notices. The non-lawyers may not, however, give legal advice, advise their customers in matters involving the mechanics' lien statute, or complete any other forms required or allowed by the mechanics' lien statute."¹⁰¹

In considering the Bar's recommendation, the court acknowledged that "any attempt to formulate a lasting, all encompassing definition of the 'practice of law' is doomed to failure,"¹⁰² but it then relied upon its definition from *State v. Sperry*.¹⁰³

[I]f the giving of such advice and performance of such services affect important rights of a person under the law and if the reasonable protection of the rights and property of those advised and served requires that the person giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.¹⁰⁴

The service provided here is only the filling out, and mailing, of two forms which are provided by statute. Filling out the forms requires only a minimum of information and it is information which is easily collected. Also, "substantial compliance with the statute will not defeat

99. *Id.* at 1014.

100. *Id.* at 1015 (relying on *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978)).

101. *Id.* (quoting the Proposed Advisory Opinion at 19).

102. *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1191-92 (Fla. 1978) (quoting *State Bar of Mich. v. Cramer*, 399 Mich. 116, 122, 249 N.W. 2d 1, 7 (1976)).

103. 140 So. 2d 587, 591 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963).

104. *Advisory Opinion*, 544 So. 2d at 1016.

a claim against a person who has not been adversely affected.”¹⁰⁵ The supreme court concluded that “it is not the unlicensed practice of law for nonlawyers to engage in communications with their customers for the purpose of completing the [Notice to Owner] forms and preliminary notice forms as that activity is described in the Committee report.”¹⁰⁶ It did, however, “agree that the nonlawyer may give no legal advice in connection with the preparation and service of the notices.”¹⁰⁷ It expressly limited its opinion to the two notices discussed.¹⁰⁸

IX. Mineral Interests

*Conway v. Terry*¹⁰⁹ deals with mineral interests, and is discussed *infra* in section XI (Rule Against Perpetuities).

X. Mobile Homes

In *Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*,¹¹⁰ the owner of a mobile home park sought declaratory judgment when faced with the threat of rent withholding by mobile home owners who claimed the owner had engaged in unfair practices. The homeowners’ association¹¹¹ filed a counterclaim alleging violation of an earlier consent judgment, violation of administrative rules and statutes, and the imposition of unconscionable rent increases.¹¹² The trial court found that the counterclaim was maintainable as a class action and certified the homeowners’ association as the appropriate class representative based upon Florida Statute § 723.079(1) (1985), which stated:

The association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest If the association has the authority to maintain a class action, the association may be joined in an ac-

105. FLA. STAT. § 713.06(2)(d) (1987).

106. *Advisory Opinion*, 544 So. 2d at 1016.

107. *Id.* at 1016-17.

108. *Id.* at 1017.

109. 542 So. 2d 362 (Fla. 1989).

110. 541 So. 2d 1121 (Fla. 1988). Justice Shaw wrote the unanimous opinion. Chief Justice Ehrlich and Justices Overton, McDonald, Barkett, Grimes, and Kogan concurred in the opinion.

111. Lanca Homeowners, a not-for-profit corporation, organized pursuant to FLA. STAT. § 723.075 (1985).

112. *Lanca Homeowners*, 541 So. 2d at 1122.

tion as representative of that class . . . involving matters for which the association could bring a class action.¹¹³

A nearly identical condominium statute¹¹⁴ had been held unconstitutional as a "legislative incursion into this court's exclusive rulemaking authority."¹¹⁵ The supreme court here similarly ruled that the section involved was also procedural and thus within the exclusive province of the court. Consequently, all but the first two sentences of the statute were declared unconstitutional.¹¹⁶

Following the logic of the earlier case, the court went on to recognize the need for the rule and the soundness of the legislative formulation. Pursuant to Florida Rule of Judicial Administration 2.130(a), it adopted the following procedural rule:

A mobile homeowners' association may institute, maintain, settle, or appeal actions or hearings in its name on behalf of all home owners concerning matters of common interest, including, but not limited to: the common property; structural components of a building or other improvements; mechanical, electrical, and plumbing elements serving the park property; and protests of ad valorem taxes on commonly used facilities. If the association has the authority to maintain a class action under this section, the association may be joined in an action as representative of that class with reference to litigation and disputes involving matters for which the association could bring a class action under this section. Nothing herein limits any statutory or common-law right of any individual home owner or class of home owners to bring any action which may otherwise be available. An action under this rule shall not be subject to the requirements of rule 1.220.¹¹⁷

Under the new rule, the homeowners' association could represent all the mobile home owners in the class action.

The next question on appeal was whether the claim of an unconscionable rent increase could be maintained as a class action. The statute¹¹⁸ provides a cause of action for an unconscionable rental agree-

113. *Id.* at 1022.

114. FLA. STAT. §§ 718.111(2) (Supp. 1976) & 711.12(2) (1975). "Only one word differs." *Lanca Homeowners*, 541 So. 2d at 1123.

115. *Avila South Condo. Ass'n v. Kappa Corp.*, 347 So. 2d 599 (Fla. 1977).

116. *Lanca Homeowners*, 541 So. 2d at 1123.

117. *Id.* at 1123-24 (adopting Florida Rule of Civil Procedure 1.222).

118. FLA. STAT. § 723.033(2) (1985).

ment or an unconscionable provision in an agreement. However, some district court opinions have indicated that unconscionability claims could not be litigated as class actions because the claims are too individualized. The supreme court pointed out that the crux is whether the rent increase was imposed across the board on all tenants after the initial lease by the park owner. This would put the mobile home owners in a position where they had little meaningful choice. They must accept the rent increase because selling or moving the mobile home from the site would be so burdensome. "The 'absence of meaningful choice' for these residents, who find the rent increased after their mobile homes have become affixed to the land, serves to meet the class action requirement of procedural unconscionability."¹¹⁹ The alleged unconscionability of a rent increase "lends itself to proof in the class action format"¹²⁰ where the circumstance is equally shared by each mobile home owner. And the Court points out that the court may create subclasses for any class members who "may not occupy the same position."¹²¹

XI. Rule Against Perpetuities

In *Conway v. Terry*,¹²² the City of Orlando had condemned property in which the petitioners claimed to have a compensable interest. They claimed to be the successors to an interest reserved by the grantor to the respondents' predecessors in title. The language in the earlier deeds stated the title was

SUBJECT HOWEVER, to the following:

2. That certain oil, mineral, and gas lease . . . the rental with respect to which is on an annual basis of fifty cents (50¢) per acre . . . except however, party of the first part does hereby specifically reserve for the account, use and benefit of [Grantor], its successors and assigns forever, one-half of any and all royalties that may be paid or obtained from the lands . . . provided however, this reservation shall not apply to participation in delay rental which may be paid on account of any existing or any future oil, mineral and gas

119. *Lanca Homeowners*, 541 So. 2d at 1124.

120. *Id.*

121. *Id.* at 1124.

122. 542 So. 2d 362 (Fla. 1989). Justice Grimes wrote the opinion in which Chief Justice Ehrlich and Justices Shaw, Barkett and Kogan concurred. Justice McDonald dissented in part and concurred in part in a written opinion with which Justice Overton concurred.

leases"¹²³

The questions before the Court were: 1) whether this language did reserve an interest which could pass to a successor, 2) whether the interest was an interest in realty entitling its owner to a share in the condemnation award, and 3) whether that interest was void because it violated the rule against perpetuities.¹²⁴

The court pointed out that the use of the words "its successors and assigns forever" are words used in creating a fee simple. This language "flies in the face of the contention that the reservation was limited to the existing lease."¹²⁵ The court might have more clearly explained this by indicating that the use of these words of limitation traditionally indicates that the parties intended to reserve an interest with the same duration as a fee simple.

The court then pointed out that under prevailing oil and gas law, the paragraph "expresses a clear intent to preserve a perpetual nonparticipating royalty interest. It is not an interest in the minerals in place."¹²⁶ The provision that delay rentals shall not be part of the reservation reinforces the court's conclusion that the reservation is only in the royalties received for minerals actually extracted.

The court then held that the interest in royalties in minerals which were still in the ground was a realty interest. It distinguished *Miller v. Carr*¹²⁷ which held that a royalty interest in minerals which had already been severed from the ground were personal property, not realty, because the royalty interest would become personal property only when the minerals were removed from the ground.¹²⁸ Here, the minerals had not been removed.

The final question was whether this perpetual royalty interest would violate the rule against perpetuities. Kansas had adopted the rule that a royalty interest is personal property and it does not vest until the minerals are removed from the ground.¹²⁹ Consequently, a perpetual royalty interest would violate the rule. However, only Kansas had expressly adopted such a rule. The Florida Supreme Court points out that "the law favors an interpretation which provides for an early vesting of

123. *Id.* at 363.

124. *Id.* at 362-66.

125. *Id.* at 364.

126. *Conway*, 542 So. 2d at 364.

127. 137 Fla. 114, 118 So. 103 (1939).

128. *Terry*, 542 So. 2d at 364.

129. *Cosgrove v. Young*, 230 Kan. 705, 642 P.2d 75 (1982).

estates."¹³⁰ Following the leading case¹³¹ and the weight of authority elsewhere, the court expressly held "that the reservation of the royalties . . . does not violate the rule against perpetuities because it created a presently vested interest in the land. The fact that production is uncertain and may never occur does not defeat the interest."¹³²

This was the point upon which Justice McDonald disagreed. He concluded that the grantors had retained no interest in the minerals or in the land. The deeds specifically stated that they retained only an interest in royalties, and where the property is under lease, as it was here, "the term should be construed in a restricted sense of denoting an interest in production."¹³³ The grantors only had a right to share in the monies derived when the minerals were removed. Consequently, their interest would be merely a contingent interest in personal property.¹³⁴

It should be noted that Florida has now adopted the Uniform Statutory Rule Against Perpetuities.¹³⁵ The analysis of this case would be no different under the new Uniform Rule because both it and its predecessor would apply to nonvested future interests.¹³⁶ However, it would be far less likely that this case would ever have reached the court under the new statute because the new statute (1) applies only to gratuitous transfers,¹³⁷ and it is unlikely that the transfer here was gratuitous; (2) includes a ninety year wait-and-see provision,¹³⁸ and there is no indication here that the ninety years has expired; and (3) provides for the court to reform a transfer according to the intent of the grantor in the event that it appears that it will not vest in time.¹³⁹

130. *Terry*, 542 So. 2d at 365.

131. *Hanson v. Ware*, 224 Ark. 430, 274 S.W. 2d 359 (1955).

132. *Terry*, 542 So. 2d at 365.

133. *Id.* at 366 (citing with approval *Doss Oil Royalty, Co. v. Lahman*, 302 P.2d 157, 166 (Okla. 1956)).

134. *Id.* (McDonald, J., dissenting).

135. Fla. Laws ch. 88-40, sec. 2 (codified as FLA. STAT. § 689.225).

136. FLA. STAT. § 689.225 (2) (Supp. 1988).

137. FLA. STAT. § 689.225(5)(a) (Supp. 1988) excludes nondonative transfers from coverage of the statutory rule against perpetuities subject to certain exceptions, e.g., transfers or settlements arrangements or transfers arising out of a marital relationship or contracts to make or revoke a will.

138. FLA. STAT. §§ 689.225(2)(a)2., (b)2. & (c)2. (Supp. 1988).

139. FLA. STAT. § 689.225(4) (Supp. 1988).

XII. Surface Water

In *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*,¹⁴⁰ a skating center was built uphill from the Buick dealership. The new building caused a significant increase in the surface water running onto the rear of the dealership property, and, following a rainstorm, extensive flooding damaged several cars. When negotiations failed to produce a solution to the problem, the dealership built a wall to act as a barrier against the runoff. It worked, causing flooding of the uphill Skating Center in the next heavy rains. The Skating Center responded by having its employees sledge-hammer holes in the wall. This litigation followed.¹⁴¹

The court reviewed the doctrines which have been used to govern surface water, *i.e.*, the common enemy rule, the civil law rule and the reasonable use rule. It then reviewed the Florida cases on the subject, concluding "[t]he Florida position with respect to the interference with surface waters is not entirely clear."¹⁴² It concluded its analysis by deciding "we have elected to adopt the reasonable use rule in cases involving the interference with surface waters."¹⁴³ It clarified the rule by quoting,

Although the courts have treated the doctrine of reasonable use as a separate rule on equal footing with the civil law and common enemy rules, it is in reality merely the general tort principle which would decide such cases in the absence of the application of either of the two "property" rules. The relationship between adjoining landowners, in the absence of specific property rights, has always been governed by the maxim, "*Sic utere two [sic] ut alienum non laedas*" ("Use your property in such a manner as not to injure that of another.")¹⁴⁴

The court appears to limit this decision by stating that "[t]he principle that an upper landowner enjoys an easement across the lower tract for all naturally occurring surface water continues to apply to

140. 542 So. 2d 959 (Fla. 1989). Justice Grimes wrote the unanimous opinion. Chief Justice Ehrlich and Justices Overton, McDonald, Shaw, Barkett, and Kogan concurred in the opinion.

141. *Westland Skating*, 542 So. 2d at 959.

142. *Id.* at 961.

143. *Id.* at 962.

144. *Id.* at 962-63 (quoting F. MALONEY, S. PLAGER, R. AUSNESS, & B. CANTOR, *FLORIDA WATER LAW* 596 (1980)).

land in its natural state.”¹⁴⁵ This is a statement of the civil law rule. Therefore, it appears that two rules are now in effect in Florida. But the court also states that when the land, upper or lower, has been improved, the reasonable use rule governs.¹⁴⁶ It is hard to imagine under what circumstances the civil law would be applied if *any* activity is to be judged by the reasonableness standard. This ambiguity in the opinion may, unfortunately, produce some confusion and wasteful litigation.

The court went on to rule that compliance with the building code would not be determinative on the issue of reasonableness. Compliance with the building code would be evidence of reasonableness, but other relevant evidence should also be considered. The court pointed out that the “persuasiveness of . . . compliance with the code may depend, in part, upon the extent to which the code seeks to protect others from being damaged by surface waters caused through the construction of the approved project.”¹⁴⁷

XIII. Zoning

In *Education Development Center v. City of West Palm Beach Zoning Board of Appeals*,¹⁴⁸ the owner of land which was zoned residential petitioned the zoning board to allow it to convert its residential property into a private preschool and kindergarten. The petition was denied, and the landowner appealed to the circuit court which reversed. However, the district court of appeal reversed because the trial court had applied the wrong standard. On remand, the circuit court again reversed the board’s decision, holding that the board’s decision was not based upon substantial competent evidence.¹⁴⁹ The Fourth District disagreed, concluding that the board’s decision was supported by substan-

145. *Id.* at 963.

146. *Westland Skating*, 542 So. 2d at 963. “The [reasonable use] rule applies not only in cases involving the conduct of the upper owner but also to improvements by the lower owner, such as the construction of dams designed to protect against the natural flow of surface waters across the lower land.” *Id.*

147. *Id.* at 964 n.7.

148. 541 So. 2d 106 (Fla. 1989). Justice Barkett wrote the opinion in which Chief Justice Ehrlich and Justices Overton, Shaw, Grimes, and Kogan concurred. Justice McDonald filed a written dissent.

149. *Id.* Note that in this opinion the terms “substantial competent evidence” and “competent substantial evidence” are used as if they are synonyms. The author has been unable to find any indication that they are not, but clarifying the point may be of interest to the court or some scholar.

tial competent evidence.¹⁵⁰ The Florida Supreme Court quashed that decision of the district court.

The supreme court pointed out that a circuit court's *certiorari* review of administrative agency action should consist of three considerations:

- (1) whether procedural due process was provided;
- (2) whether the essential requirements of the law were observed; and
- (3) whether the agency's findings and judgment are supported by competent substantial evidence.¹⁵¹

However, the scope of subsequent review of the circuit court's opinion by the district court of appeal is narrower. The district court is limited to only two considerations:¹⁵²

- (1) "whether the circuit court afforded procedural due process," and
- (2) whether the circuit court "applied the correct law."¹⁵³

There had been no contention that the circuit court had violated the requirements of due process, and there was no finding by the district court that the trial judge did not use the correct law. Therefore, the supreme court concluded, to reverse on other grounds would be to exceed the proper scope of review.¹⁵⁴ This case clearly establishes the proposition that the district court of appeal, when reviewing by *certiorari* the decision of a circuit court which reviews agency action, may not re-examine the question of whether the agency's decision was based upon substantial competent evidence.

Justice McDonald's dissent interpreted the district court decision as the "equivalent to the appellate court's determination that in assessing the facts the trial judge failed to apply the right law."¹⁵⁵ "There was ample evidence for the board to reach its conclusion. When the trial judge declared to the contrary, he was not following the appropriate law in assessing factual matters."¹⁵⁶ Justice McDonald protested that the trial judge's use of the "magic words," *i.e.*, "'there was no substantial competent evidence,'"¹⁵⁷ should not insulate the decision

150. *City of West Palm Beach Zoning Bd. of Apps. v. Education Dev. Center, Inc.*, 526 So. 2d 775 (Fla. 4th Dist. Ct. App. 1988).

151. Fla. R. App. P. 9.030(c)(3).

152. Fla. R. App. P. 9.030(b)(2)(B).

153. *Education Dev. Center*, 541 So. 2d at 108 (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)).

154. *Id.* at 108-09.

155. *Id.* at 109 (McDonald, J., dissenting).

156. *Id.*

157. *Id.*

from review by the district court of appeal on the question of whether the trial court had correctly applied the correct law because that would make the trial judges "absolute czars in zoning matters."¹⁵⁸

XIV. Conclusions and Observations

The cases surveyed here are a small sample of the work of the Florida Supreme Court. However, certain points are worth noting. Of the fourteen real property related cases decided during the period examined, nine were unanimous decisions. Of the five split decisions, none were close votes—the majority always had at least five of the seven votes. This level of agreement by the justices is remarkable.

Further, the writing chores were evenly shared by the Justices. Justices Overton, Shaw, Kogan, and Barkett and Chief Justice Ehrlich each wrote one property-related opinion. Justice McDonald wrote two, and Justice Grimes wrote four. Three opinions were *per curiam*. From this slight sampling, it does not appear that any pattern of dominance in the real property area has emerged.

Also, there was nothing surprising or daring about any of these decisions. The emphasis was on the practical, rather than theoretical, aspects of the law. The only case which really changes the law is *Westland Skating Center, Inc. v. Gus Machado Buick, Inc.*¹⁵⁹ and it merely follows a trend established elsewhere. All the others continue the process of reiterating established rules and elaborating upon their application.

158. *Education Dev. Center*, 541 So. 2d at 109.

159. 542 So. 2d 959 (Fla. 1989) (concerning the right to get rid of surface water). This case is discussed *infra*, notes 112-20 and accompanying text.